

1 discovery and --

2 MS. KANE: Your Honor, we think
3 it's just cleaner that, you know, since we
4 don't have dates for the depositions for the
5 DePriests and it sounds like we still have to
6 resolve the FOIA issues before they're going
7 to give us those dates, and then allow those
8 depositions to proceed, that we have an order
9 that says discovery closes six weeks from the
10 date of the last deposition.

11 That gives us ample time to get
12 the transcripts from the depositions as
13 necessary to seek additional written
14 discovery. Within our rules, at least, I
15 believe it's interrogatories, are 14 plus the
16 three days for service. So that's seventeen
17 days right there, that's nearly a month of
18 time.

19 JUDGE SIPPEL: Well are these
20 interrogatories going to parties or outside
21 witnesses?

22 MS. KANE: If we were to serve

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1 additional discovery, it's most like that
2 discovery would go to Maritime. But it's
3 possible --

4 JUDGE SIPPEL: Well, we could
5 shorten the time for them.

6 MR. KELLER: Well, if I heard Ms.
7 Kane right, I mean, when you're talking about
8 the six weeks of the deadline, you're
9 incorporating in that time to respond to the
10 written discovery as well. When you said the
11 17 days, you're incorporating that?

12 MS. KANE: Well, it's my
13 understanding that we would need to be able to
14 serve discovery within a time period that
15 would allow the party to respond before the
16 close of discovery.

17 MR. KELLER: All right, I have no
18 problem with that.

19 MS. KANE: That is standard
20 practice, so we would ask, let's say the
21 depositions were December 1st and 2nd, that it
22 would be six weeks from December 2nd would be

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1 the close of discovery. But since we don't
2 have a deposition date from Maritime, we can't
3 plan what that six week date out would be.

4 JUDGE SIPPEL: Okay, get together
5 after this is over and agree to something with
6 Mr. Keller. And also, Mr. Chen, do you have
7 any interest in this request for more time,
8 Mr. Chen?

9 MR. CHEN: Well --

10 JUDGE SIPPEL: For your client?

11 MR. CHEN: -- our issue is just we
12 want to make sure that the Enforcement Bureau
13 has ample time for discovery. I want to make
14 sure that Ms. Kane is able to garner the
15 information that she needs to assemble her
16 case.

17 JUDGE SIPPEL: Okay. Well that
18 sounds like agreement. Well she will, you
19 know, you'll get a chance to take a look at
20 these dates. It can be faxed to you or the
21 draft can be faxed to you or emailed to you
22 like everybody else in this case.

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1 MR. CHEN: Right.

2 JUDGE SIPPEL: And I will act on
3 it next week. So I could give a date certain,
4 why not have all this in by next Wednesday?
5 I know there's a holiday, but is that doable?

6 MS. KANE: If Mr. Keller is going
7 to be able to provide us with deposition dates
8 by next Wednesday.

9 JUDGE SIPPEL: Well I'm figuring
10 that you will.

11 MR. KELLER: Well no, I understood
12 you're going to tee it to six weeks after the
13 deposition.

14 MS. KANE: Correct. But it was my
15 understanding that the Judge wanted a specific
16 date.

17 JUDGE SIPPEL: Yes, that's what I
18 want to do.

19 MS. KANE: That's what he's asking
20 us to decide by next week and --

21 MR. KELLER: Well, then that's
22 going to be a problem because we need to

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1 resolve the FOIA matter before we set the
2 dates for the deposition.

3 JUDGE SIPPEL: Well look, we can
4 always delay the deposition if you still have
5 a concern that's worthy of being a concern.
6 But I have to do something to move this
7 forward. This train isn't moving.

8 MR. KELLER: All right.

9 JUDGE SIPPEL: Give me the dates,
10 I'll set them down, and do you want to put a
11 qualifier on any, with a cover letter,
12 anything you want to do, but give me the
13 dates. Okay? And the same day, it would
14 apply to coming in with that language on the
15 protective order because you're probably going
16 to have to circulate that.

17 MALE PARTICIPANT: Yes, get some
18 input.

19 MR. KELLER: All right, so in that
20 case Wednesday's fine.

21 JUDGE SIPPEL: Okay, what is the
22 date of Wednesday? The date of Wednesday is,

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1 I've got a new calendar here but --

2 MALE PARTICIPANT: The 28th.

3 MS. KANE: 28th.

4 JUDGE SIPPEL: The 28th? Okay,
5 let me write that down, the 28th of November.
6 Now I should just tell you this as a matter of
7 passing, but I'm going to be out of the
8 country from the 17th of December until the
9 7th of January. That should not interfere
10 with anything that's going on here but like I
11 said, the last time I tried that I had the
12 Wireless Bureau contacting me on Christmas Eve
13 that they were taking my case back. And so
14 anything can happen these days. All right.

15 MS. KANE: Your Honor, can we
16 raise another thing with regard to the
17 schedule?

18 JUDGE SIPPEL: Yes, go ahead.

19 MS. KANE: Well, if you recall, we
20 had a kind of proposed prehearing schedule
21 that we proposed in May, I believe, and then
22 at our last prehearing conference, we raised

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1 the concern that we were coming up right up
2 against the Game Show Network case, which had
3 originally been scheduled for hearing I think
4 at the end of January. And we were originally
5 scheduled to go to hearing at the end of
6 February.

7 JUDGE SIPPEL: Guess what
8 happened? It got delayed because of
9 discovery.

10 MS. KANE: I know they got
11 delayed. Correct, so --

12 JUDGE SIPPEL: Surprise, surprise.

13 MS. KANE: -- but at that point, I
14 believe you put our schedule into advance --

15 JUDGE SIPPEL: Oh.

16 MS. KANE: -- and have suggested
17 to us that we propose a new schedule. And
18 that's what prompted, we knew we would always
19 have to move the schedule. I think at this
20 point, rather than propose a full, complete
21 hearing schedule with exchange of trial briefs
22 and witnesses, what we would suggest Your

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1 Honor consider is us proposing a schedule
2 where we did summary decision briefing first.
3 And if that was able to resolve the pending
4 issue, which is Issue G, then we wouldn't need
5 to proceed with going through the other steps
6 of exchange of documents, exchange of witness
7 lists, et cetera.

8 And we do believe that based on
9 discovery so far, that this is a case that
10 could be decided by Your Honor on summary
11 decision. So we would --

12 JUDGE SIPPEL: Now you know you're
13 going to get opposition from me. You're going
14 to get opposition from Maritime, you're going
15 to get opposition from Mr. Havens.

16 MS. KANE: Well, we understand
17 that we might have opposition on the issue, on
18 the legal question, Your Honor, as to
19 permanent discontinue of construction.

20 JUDGE SIPPEL: Forget about the
21 legal issue, it's the issue of fact. You have
22 to --

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1 MS. KANE: I know.

2 JUDGE SIPPEL: -- you know, you
3 have a standard with respect to having no
4 substantial issue of fact.

5 MS. KANE: I understand that, Your
6 Honor. I'm actually pretty confident that
7 Maritime and the Bureau could agree on the
8 fact that would be necessary for Issue G.

9 MR. KELLER: Your Honor --

10 JUDGE SIPPEL: But what about Mr.
11 Havens?

12 MS. KANE: Well I don't know about
13 Mr. Havens, I mean, as you know, the Bureau
14 and Maritime have agreed with regard to
15 construction on the Watercom issues for
16 summary judgement, which raised the 93 boxes
17 question, but I think based on the discovery
18 that we've had so far and certainly Mr.
19 Keller's earlier understanding that he would
20 be willing to stipulate on the service date
21 issue, we might very well be in a position
22 where this case could be resolved on summary

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1 decision, or at least we should go down that
2 path first rather than going through a full
3 blown hearing schedule in preparing for
4 hearing before we determine whether that is
5 necessary.

6 JUDGE SIPPEL: All right, let's
7 put that question in, we'll table that
8 question for now. The only thing I'm looking
9 for are dates with respect to these DePriest
10 depositions. And everything else is going to
11 get left pending --

12 MS. KANE: And the close of
13 discovery.

14 JUDGE SIPPEL: -- I mean, if I
15 said that everything is advance pending Game
16 Show, and that's after then fine, let's leave
17 it that way. Okay? Is that all right with
18 you?

19 MS. KANE: I mean obviously --

20 JUDGE SIPPEL: It's not disrupting
21 anybody.

22 MS. KANE: It's not disrupting

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1 obviously, you know, if it's something that we
2 think we could resolve on summary judgement,
3 would you be concerned about us filing that
4 prior to it?

5 JUDGE SIPPEL: No, no, no, what,
6 prior to these depositions? These are
7 depositions. That's all we're talking about.

8 MS. KANE: Okay, well all I'm
9 saying, Your Honor, is that I think we could
10 agree to the depositions and a close of
11 discovery. And then what you're saying is we
12 would hold in abeyance any further dates?

13 JUDGE SIPPEL: Exactly.

14 MS. KANE: Okay.

15 MR. KELLER: But, and as I also
16 understood, that wouldn't preclude either
17 party from filing a summary decision.

18 JUDGE SIPPEL: Of course not.

19 MS. KANE: That's all we were
20 asking.

21 JUDGE SIPPEL: Good question.

22 MR. KELLER: Because I agree with

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1 Ms. Kane, I think we are going to be able to
2 stipulate to most of the facts. I mean, it's
3 going to be a knock down, drag out fight with
4 the legal interpretation of those facts.

5 JUDGE SIPPEL: Well I've got a lot
6 of assistants now, I don't have to do knock
7 down drag outs anymore. Okay, but we're set
8 on what has to be done, right? By next
9 Wednesday I'm going to get dates, I'm going to
10 do with the DePriest depositions and then if
11 you want to have a closing discovery agreed
12 to, that's fine. And I'm going to have
13 language with respect to amending the
14 protective order for consideration.

15 Okay, let's move on. The
16 glossary, the glossary. I think we could go
17 down line by line but I don't intend to do
18 that. What we have is, the problem we have I
19 think is the, what does construction mean?
20 And this question that Mr. Havens raises
21 about, is a series of set sites that come into
22 play as a system. I don't know how that

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1 should get into what a definition of
2 constructive means, but let me hear, I don't
3 know where to start on this one. Let me hear
4 from Maritime on this.

5 MR. KELLER: Your Honor, I think
6 where we are in the glossary, and we talked
7 about this in a conference call yesterday with
8 Ms. Kane and the Havens parties --

9 JUDGE SIPPEL: Well yes, she's
10 picking up the phone --

11 MR. KELLER: Oh yes.

12 JUDGE SIPPEL: -- okay, Ms. Kane,
13 thank you. All right. You had me worried
14 there for a minute.

15 MR. KELLER: I think we're at a
16 big philosophical, at least Ms. Kane and I are
17 at a big philosophical difference about the
18 reason we've been unable to agree to many of
19 these terms is that I have certain rulings
20 that said to stipulate to an awful lot of
21 things factually. I believe there's been
22 enough discovery now we know what the facts on

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1 the ground are. For example, you know, we can
2 say a facility was constructed and
3 operational, with capable of providing
4 service.

5 JUDGE SIPPEL: What do you mean by
6 constructed when you say constructed?

7 MR. KELLER: I mean built, I mean
8 the whole thing was put up and plugged in,
9 it's operational, it's capable of providing
10 two way service to mobile units.

11 JUDGE SIPPEL: Well can't you have
12 something instructed before it becomes
13 operational? Don't you have to turn the key
14 or something?

15 MR. KELLER: Well, in this exact
16 statement, as we stated in prior discovery
17 requests, in this particular service and the
18 way this thing, that's one at the same time.
19 I mean, what would happen in the day is the
20 stations would get constructed, then it would
21 be put on the air, they would be operational.
22 At that point the Commission would be notified

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1 the construction was complete. So no, I
2 don't, there's not a distinction between
3 constructed and operational.

4 I mean, if there's something that
5 renders the station inoperable, then it's not
6 constructed, you know? In fact, what we
7 provided in discovery, there were certain
8 stations we classified as temporarily
9 discontinued, precisely because they were
10 incapable of operating right now because of
11 lost utilities.

12 JUDGE SIPPEL: Let's say after the
13 fact of.

14 MR. KELLER: Yes, but here's the
15 point. On a lot of these definitions,
16 constructed being one of them, operation being
17 another one, what means operation, we're
18 willing to stipulate to an awful lot of fact,
19 but what we're not willing to stipulate is the
20 legal conclusions to be drawn from those
21 facts. Ms. Kane, and constructed is perhaps
22 not the best example, we weren't allowed to

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1 talk about operational.

2 JUDGE SIPPEL: Well that's the one
3 that I'm stuck on.

4 MR. KELLER: Okay.

5 JUDGE SIPPEL: I mean, right now
6 I'm stuck on that.

7 MR. KELLER: Well I don't know
8 that we have a dispute with the Bureau on
9 constructed.

10 JUDGE SIPPEL: Well what about Mr.
11 Havens though?

12 MR. KELLER: We haven't conceded
13 with Mr. Havens on a number of scores. He,
14 number one, the system thing you're talking
15 about. It is true that the Maritime service,
16 the AMTS service, was originally conceived of
17 as a system of licenses, okay? And in fact,
18 later on they started doing them all under one
19 call sign and --

20 JUDGE SIPPEL: Now you're waving
21 your hands up, you mean a system being like
22 you have them in five different communities

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1 down the coast, something like that?

2 MR. KELLER: Yes. For example,
3 the Watercom licenses are all up and down the
4 Mississippi and Ohio River. And that was a
5 system of licenses, and there were at the
6 time, certain rules the Commission had about
7 how many stations you had, a minimum number of
8 stations and the coverage you had. And they
9 also had rules regarding what was called
10 continuity of service, which essentially
11 required there to be contiguous coverage from
12 station to station. So as a barge moved up
13 the river, you know, it would constantly be in
14 range of, so that's true that historically
15 that was there.

16 What Mr. Havens has been
17 asserting, at least in the SkyTel O-filing
18 that was recently, it was made shortly before
19 this last counsel departed, was that if one of
20 those stations is terminated for any reason,
21 then the whole system falls apart. And he's
22 also been stating, so that's number one. I

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1 mean, the connection between whether the
2 stations are valid, that's not our
3 understanding. Our understanding is the
4 Commission has, in fact, in the past, in the
5 case of Maritime and some of these various
6 licenses, has terminated the licenses to the
7 location, one or two locations, but has not
8 terminated the whole system license.

9 JUDGE SIPPEL: Is it a system
10 license that is issued? IS that what you get?

11 MR. KELLER: Well, it was
12 originally licensed as a system license. I
13 think a lot has changed when the Commission
14 went to geographic licensing and --

15 JUDGE SIPPEL: Wait a minute, wait
16 a minute, you're still leaving me fuzzy here.
17 The license is going to identify some
18 frequency and some location. Are they
19 identifying the location by way of a specific
20 station?

21 MR. KELLER: Different location,
22 numerous locations, almost like a --

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1 JUDGE SIPPEL: On one license.

2 MR. KELLER: On one license, with
3 the exception of Watercom that's individual
4 licensing because that was done a long time
5 ago. But for instance, WRB 374 is an example.
6 The call sign WRB 374, which is at issue in
7 this station, is a license. And if you look
8 at the license, it will have location numbers
9 going down the frequencies. Now what I am
10 saying to you is that, and if you look at
11 that, you will see that the numbers, there are
12 gaps missing in the numbers.

13 JUDGE SIPPEL: Okay.

14 MR. KELLER: And that's because
15 some of the stations were not constructed
16 originally and some of the stations were later
17 terminated. But it didn't invalidate the
18 whole license.

19 MR. PLACHE: It's not a situation
20 where --

21 JUDGE SIPPEL: This better move
22 forward.

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1 MR. PLACHE: It's not a situation
2 where you have to have every location
3 operational in order for any location to be
4 legal. You don't lose the right to 20
5 locations if one location goes up in the air.

6 MR. HAVENS: Well, I mean, Your
7 Honor --

8 JUDGE SIPPEL: Wait a minute, Mr.
9 Havens, we're not --

10 MR. PLACHE: Is that Mr. Havens'
11 counsel talking or --

12 JUDGE SIPPEL: No, that's Mr.
13 Havens.

14 MR. PLACHE: Okay.

15 JUDGE SIPPEL: Go ahead.

16 MR. HAVENS: Your Honor --

17 JUDGE SIPPEL: Wait, wait, we're
18 hearing from Pinnacle.

19 MR. HAVENS: Okay.

20 JUDGE SIPPEL: He's not finished
21 yet.

22 MR. HAVENS: That's fair.

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1 MR. PLACHE: It's a situation
2 where there are multiple locations on one
3 license. So there's one call sign, it will
4 have multiple locations. In the case of WRB
5 374, there's locations all the way up and down
6 the East Coast.

7 JUDGE SIPPEL: So what does that
8 do --

9 MR. PLACHE: There's no condition
10 on the license that every single location has
11 to be operational or all locations are lost.

12 JUDGE SIPPEL: Well, what about
13 this --

14 MR. PLACHE: That's short of a,
15 that's a concept I've never heard before in
16 years of practicing law.

17 JUDGE SIPPEL: Well what about
18 this, well, I'm only relying on, I only have
19 to concern myself with what's an Issue G has
20 and can set down for a hearing. And Issue G
21 says, to determine whether Maritime
22 constructed or operated any of its stations at

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1 variance with Sections 1.95 and 8.49.

2 Now does that means it's got to
3 be, if one station goes out, that if they got
4 four other stations that are operating within
5 the system that the individual station is not
6 a problem, for purposes of this case?

7 MS. KANE: Your Honor, that's what
8 I understand Mr. Havens is arguing, but I'm
9 not sure that the precedence supports that.
10 But I think --

11 JUDGE SIPPEL: Well as I
12 understand, well wait just a minute --

13 MR. PLACHE: I'm not sure
14 everybody's clear about that.

15 JUDGE SIPPEL: Was I stating that
16 correctly for you?

17 MR. PLACHE: I don't know that I
18 understood your question --

19 JUDGE SIPPEL: Or let me say it
20 this way, you've got a system and it's got
21 five stations up and down the coast, okay?
22 For some reason or another one of them is

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1 discontinued, whether it, because of a
2 business reason or because whatever reason,
3 it's discontinued. And once you get a license
4 you're supposed to keep a station operating
5 unless you get permission from the Commission.
6 My question is, can the system still operate
7 as a system with four of the five?

8 MR. PLACHE: Well, if it's
9 operating as a system, yes. I don't think
10 there's a requirement that it operate as a
11 system. I don't think that there's a
12 requirement that every station on the license
13 has to be operational or any single station,
14 to be valid.

15 JUDGE SIPPEL: All right, in my
16 hypothetical, the one that's not operating,
17 it's in violation of the license provision, is
18 that correct?

19 MR. PLACHE: If it's not
20 operating?

21 JUDGE SIPPEL: It's not operating.

22 MR. PLACHE: I don't know that I

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1 would use the violation, it means it's not
2 operational. And if it's permanently
3 discontinued, then that one location should
4 then be taken off the license.

5 JUDGE SIPPEL: And you turn a
6 license back to the Commission so that --

7 MR. PLACHE: Not the license.

8 JUDGE SIPPEL: The license, no?

9 MS. KANE: Just the location, Your
10 Honor.

11 JUDGE SIPPEL: Just the location.

12 MR. PLACHE: See, you've got
13 licenses with one call sign that will have 30
14 locations or more.

15 JUDGE SIPPEL: But that's what
16 you've told me.

17 MR. PLACHE: Yes.

18 JUDGE SIPPEL: But let me ask you
19 --

20 MR. PLACHE: You don't turn the
21 whole license back, you just, that one
22 location is gone. It's permanently abandoned.

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1 JUDGE SIPPEL: Oh, so, okay.

2 MR. PLACHE: Maybe the hurricane
3 came and now that town is -

4 JUDGE SIPPEL: That's right,
5 that's right.

6 MR. PLACHE: -- completely
7 underwater, it got washed away --

8 JUDGE SIPPEL: Good example.

9 MR. PLACHE: -- it's gone.

10 JUDGE SIPPEL: Now what this issue
11 says, to determine whether Maritime
12 constructed or operated any of its stations at
13 variance. And I'm saying, it doesn't say
14 anything about a system here.

15 MR. PLACHE: That's correct. I
16 don't think we should get hung up on the word
17 system.

18 JUDGE SIPPEL: Thank you.

19 MR. PLACHE: Okay.

20 JUDGE SIPPEL: That satisfies me.
21 Now, Ms. Kane.

22 MS. KANE: I think this is what

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